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SUPREME COURT, U.S.

No. 06-317

IN THE

Supreme Court of the United States

BEATRICE ROSARIO,

Petitioner,

v.

KEN-CREST SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented any compelling reasons to grant the Petition for a Writ of *Certiorari*, where the Third Circuit's Order affirming the District Court's June 8, 2005 Opinion does not conflict with a decision of this Court or a Court of Appeals nor does it implicate an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Ken-Crest Services is a Pennsylvania Non-Stock Non-Profit corporation with no parent and/or subsidiary corporation(s).

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INTRODUCTION

Petitioner has presented no "compelling reasons" for her Petition for a Writ of *Certiorari* to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the Third Circuit's June 5, 2006 Order ("Order") affirming the District Court's June 8, 2005 Opinion ("Opinion") is in conflict with a decision of this Court or another Court of Appeals or that the Third Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Therefore, the Petition should be denied.

At the outset, Petitioner contends that the Third Circuit's Order creates a Circuit split because it allows district courts to apply different standards and burdens of proof in employment discrimination cases. In this case, however, both the Third Circuit and the District Court properly applied the burden-shifting framework set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) to determine that Petitioner failed to establish a *prima facie* case of race or national origin discrimination under Title VII or Section 1981 since she could not demonstrate that non-members of the protected class were treated more favorably than she or that her termination was the result of discriminatory motive. Moreover, the District Court properly determined that even if Petitioner had presented evidence sufficient to establish a *prima facie* case of discrimination, she failed to present evidence to refute her employer's legitimate reason for her termination. Although Petitioner attempts to spin her discharge into illegal employment discrimination, the Third Circuit and the District Court correctly held that she cannot prove that she was discharged because of her claimed race or national origin.

Simply put, Petitioner has failed to completely carry her burden of demonstrating that there are any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

Ken-Crest Services (hereinafter "Respondent") is a 100-year-old non-profit human services agency that is the largest provider of community-based services and support in the Delaware Valley for people with mental retardation and other developmental disabilities. Petitioner, a long-term employee with Respondent, was terminated from her employment as a Community Home Supervisor after an internal investigation confirmed that she struck a resident of one of Respondent's facilities during a social function.

The events leading up to Petitioner's discharge began when Answad Hopewell, a Philadelphia County case manager assigned to one of Respondent's facilities, levied a complaint against Petitioner for abusing one of Respondent's residents in her care. After confronting Petitioner about her mistreatment of the resident, Mr. Hopewell, a black male, reported Petitioner's abuse to Petitioner's direct supervisor, Pricilla Reid, a black female. In response to the allegation of abuse, Respondent conducted an investigation into the allegations of abuse. Director of Philadelphia Residential Services, Maggie Bolin, a Caucasian female, assigned Program Director, Pauline Baker, to conduct the investigation into the allegations of abuse against Petitioner. Ms. Baker is of Jamaican decent.

During the course of her investigation, Ms. Baker interviewed several witnesses and attendees of the social

function, including Petitioner. One witness, Sandra Brown, a black female also employed as a Community Home Supervisor, confirmed that Petitioner had hit the resident. Following Ms. Baker's investigation, Petitioner's abuse of the resident was confirmed and Petitioner was terminated.

Following her termination, Petitioner took advantage of Respondent's grievance process and appealed her termination to Ms. Bolin, the same person who had promoted Petitioner to the position of Community Home Supervisor seven years prior. After meeting with Petitioner and reviewing Ms. Baker's investigative report, Ms. Bolin upheld Petitioner's termination. Petitioner then appealed her termination to Harry Peck, the Director of Residential Services, a black male. Mr. Peck also upheld the decision to terminate Petitioner.

Petitioner attempts to substantiate her discrimination claims by alleging that she was "harassed" by two co-workers, both black females, who asked Petitioner about her financial status. However, Petitioner provides no evidence to support her belief that her co-workers asked these questions due to her race and/or national origin. Notably, these allegations are wholly absent from Petitioner's EEOC Charge of Discrimination. (Pet. App. at 36a). The District Court correctly determined, however, that Petitioner is bound by the allegations in her EEOC charge and any allegations of harassment against these individuals were waived.

Similarly, Petitioner alleges that a co-worker told her that Mr. Hopewell, the case manager who had reported the abuse, referred to another case manager as "the guy down there who employs all the Africans." Petitioner relies exclusively on this hearsay evidence as proof that

Mr. Hopewell was "personally biased" against her. As the District Court properly determined, however, even if the Court were to view Mr. Hopewell's comments as some sort of bias against Africans, hearsay evidence cannot be considered to defeat a summary judgment motion. (Pet. App. at 37a).

Petitioner likewise fails to show that non-members of the protected class were treated more favorably. Although Petitioner alleges that on two occasions during the course of her employment she was denied promotions, Petitioner admits that she never applied for either position. Moreover, Respondent hired a black female to fill the Program Director position that Petitioner felt she deserved.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried her burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. *The District Court Properly Granted Summary Judgment In Favor Of Respondent As Petitioner Failed To Establish A Prima Facie Case Of Race And/Or National Origin Discrimination.*

Petitioner's main complaint—*i.e.*, that the District Court denied her the opportunity to present her case to a jury—reveals a fundamental misunderstanding of the burden-shifting framework established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) to analyze

discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.*, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981(a) (hereinafter "Title VII"). Despite Petitioner's contentions to the contrary, the District Court applied the proper legal standard of review in evaluating Petitioner's claims of discrimination based on the record before it and determined, viewing all facts and reasonable inferences in her favor, that Petitioner failed to establish a *prima facie* case of discrimination. The District Court cogently recognized that Petitioner could not sustain a *prima facie* case of discrimination under Title VII by relying on her own self-serving statements, hearsay and accusations of harassment not previously contained in her EEOC Charge of Discrimination, and that summary judgment in favor of Respondent was appropriate.

Specifically, absent direct evidence of discrimination, to bring a claim for wrongful termination based on race or national origin discrimination under Title VII and Section 1981,[1] a plaintiff must establish that: (1) she is a member of a protected class; (2) she is qualified for the former position; (3) she suffered an adverse employment action; and (4) either

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1. This burden-shifting analysis also applies to employment discrimination claims under 42 U.S.C. § 1981. *See Pamintuan v. Nanticoke Memorial Hosp.*, 192 F.3d 378, 385 (3d Cir. 1999); *Stewart v. Rutgers, The State University*, 120 F.3d 426, 432 (3d Cir. 1997). Accordingly, the proof required for a plaintiff to prevail under 42 U.S.C. § 1981 is identical to that required in a Title VII case. *See Harris v. SmithKline Beecham*, 27 F. Supp. 2d 569, 576 (E.D. Pa. 1998) (applying the same analysis of race discrimination claims under Title VII to claims under Section 1981); *Roebuck v. Drexel Univ.*, 852 F.2d 715, 726 (3d Cir. 1988); *Lewis v. University of Pittsburgh*, 725 F.2d 910, 915 n.5 (3d Cir. 1983) (section 1981 claim "requires the same elements of proof as a Title VII action").

non-members of the protected class were treated more favorably than the plaintiff, or the circumstances of the plaintiff's termination give rise to an inference of race discrimination. *McDonnell Douglas*, 411 U.S. at 802; *Goosby v. Johnson & Johnson Med., Inc.*, 228 F.3d 313, 318-19 (3d Cir. 2000); *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 356 (3d Cir. 1999). Although the *prima facie* elements of a discrimination claim vary depending on the particular facts of the case, *Sarullo v. U.S. Postal Service*, 352 F.3d 789, 797-98 (3d Cir. 2003) (*per curiam*), the plaintiff must generally present evidence that "raises an inference of discrimination." *Storey v. Burns Int'l Sec. Servs.*, 390 F.3d 760, 763-64 (3d Cir. 2004) (*quoting Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 510 (2002)).

In this case, the District Court accurately applied the *McDonnell Douglas* framework to determine that Petitioner failed to establish a *prima facie* case of race or national origin discrimination under Title VII or Section 1981. Although Petitioner has shown that, as an African-American Liberian, she is a member of a protected class; that she is presumptively qualified for the position in question, given that she had held it for nearly twelve years; and that she suffered an adverse employment action by having been terminated; Petitioner does not satisfy the fourth prong of the *McDonnell Douglas* standard. Specifically, she fails to demonstrate that either non-members of the protected class were treated more favorably, or that the circumstances of her termination raise an inference of discrimination.

Although Petitioner alleges that on two occasions during the course of her employment she was denied promotions, Petitioner admits that she never applied for either position. Moreover, Respondent hired a black female to fill the

Program Director position that Petitioner felt she deserved. Further, while Petitioner attempts to substantiate her discrimination claims by alleging that she was "harassed" by two co-workers, both black females, who asked Petitioner about her financial status, Petitioner provides no evidence to support her belief that her co-workers asked these questions due to her race and/or national origin. Similarly, Petitioner incorrectly relies exclusively on hearsay evidence as proof that Mr. Hopewell was "personally biased" against her. As the District Court properly determined, however, even if the Court were to view Mr. Hopewell's comments as some sort of bias against Africans, hearsay evidence cannot be considered to defeat a summary judgment motion. *See Brown v. Muhlenberg Township*, 269 F.3d 205, 212 n. 5 (3d Cir. 2001) (*citing* Fed. R. Civ. P. 56(e) requirements for admissible affidavits); *Blackburn v. United Parcel Serv.*, 179 F.3d 81, 95 (3d Cir. 1999) ("[A] hearsay statement that is not capable of being admissible at trial should not be considered on a summary judgment motion.").

In light of Petitioner's failure to present any evidence to establish a *prima facie* case of race or national origin, the decisions of the Third Circuit and District Court clearly do not conflict with a decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Petitioner has failed to demonstrate that there are any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

II. *The District Court Properly Granted Summary Judgment In Favor Of Respondent As Petitioner Failed To Offer Sufficient Evidence To Conclude That Respondent's Reason For Her Discharge Was Pretextual.*

Petitioner further contends that the District Court failed to recognize that disputed issues of material facts existed as to whether she actually abused Respondent's mentally disabled resident. Again, this is a misunderstanding of the burden-shifting standard of *McDonnell Douglas*.

Once a *prima facie* case is established, the burden of production shifts to the defendant to produce a legitimate non-discriminatory reason for the adverse employment action taken against the plaintiff. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000). Because the burden of persuasion does not shift at this stage, the employer's legitimate non-discriminatory reason is not evaluated insofar as its credibility is concerned. *Id.* Once a legitimate nondiscriminatory reason is proffered, the presumption of discrimination created by the *prima facie* case "drops away." *Id.* At this point, the plaintiff must proffer sufficient evidence for the fact finder to conclude by a preponderance of the evidence that the legitimate non-discriminatory reasons offered by the employer were not true, but were a pretext for unlawful discrimination. *Id.*

In this case, when viewed in a light most favorable to Petitioner, the evidence presented does not even suggest racial or national origin discrimination. Rather, Petitioner was terminated because she abused a resident which was confirmed through an internal investigation. Following her termination, Petitioner took advantage of Respondent's

grievance procedure and her termination was upheld. All or most of the critical witnesses against Petitioner and the decision makers in the investigative process were African American and/or black. Based on the record before the District Court, Petitioner could not prove that she was wrongfully discharged or refute the legitimate business reason articulated by Respondent for her termination. *See Reeves*, 530 U.S. 133 (instructing that employer would be entitled to summary judgment if the record conclusively reveals some other nondiscriminatory reason or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue). *See also Traylor v. Brown*, 295 F.3d 783 (7th Cir. 2002) (affirming summary judgment to employer since (i) no *prima facie* case was proven, and (ii) assuming *prima facie* case, the employer's explanation was unrefuted). Despite Petitioner's claims to the contrary, the decisions of the Third Circuit and District Court in this case clearly do not conflict with a decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not shown any compelling reasons for this Court to review this case and the Petition should be denied.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition for a Writ of Certiorari. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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